



Memorandum

TO: RULES COMMITTEE

FROM: Councilmember Sam Liccardo
Councilmember Rose Herrera
Councilmember Madison
Nguyen

SUBJECT: SAN JOSE IS OPEN FOR BUSINESS

DATE: September 2, 2010

APPROVED:

Sam Liccardo

Madison Nguyen

Rose Herrera

9/2/10

RECOMMENDATION

Direct the City Manager and City Attorney to:

Where possible, clarify and memorialize in City policy any change in implementation of the following ordinances as directed. Where an ordinance revision becomes necessary, prepare proposed language that responds to the changes requested below, and return to Council after recommendation and report of the Planning Commission. Any potential budgetary impacts should be identified to Council prior to the taking of any formal enactment of the ordinance:

1. Where an applicant for a permit with the Building Department is presented with the conflicting opinion of different City inspectors, provide a means by which the applicant can obtain a resolution of any conflict from the City Manager or her designate within 3 business days.
2. Provide an aggregate estimate of all City permit fees and taxes to an applicant prior to, or at the time of, the submission of the application, subject to any qualifications that newly-discovered or unique conditions will necessitate additional charges.
3. Clarify Title 20 of the Municipal Code to reduce the evidentiary burdens on businesses seeking to establish a longstanding, legal nonconforming (LNC) use. Alternative approaches might include:
 - a. Allow any business an option of either: (1) seeking a fast-tracked "tentative" LNC finding that can be issued to avoid adverse code enforcement action, but that could be rescinded with sufficient rebuttal evidence, or (2) seeking "final determination" of LNC, with a more thorough, rigorous fact-finding process (and requiring a higher fee).
 - b. Allow a signed, attested declaration from the business owner to be given substantial evidentiary weight, particularly in the absence of contrary evidence of continuous use.
 - c. To minimize the risk of onerous longstanding impacts in residential areas, any revisions should:
 - a. apply only to commercial or industrial uses on sites with non-residential zoning.

- b. Exclude businesses located adjacent to residences if engaged in uses likely to impose uniquely undesirable impacts, such as adult book stores, marijuana dispensaries, or 24-hour bail bonds offices.
4. Amend Title 20 of the Municipal Code to exempt full-service hotels in the Downtown with at least 75 rooms from any Conditional Use Permit requirements for a drinking establishment.
 - a. The ordinance should retain general restrictions on noise, hours of operation, and the like, similar to those imposed by any Conditional Use Permit.
5. Amend the Parking Incentive Program to allow any non-City run business incubator, shared workspace, innovation center, or other entity with 5 or more small businesses the ability to engage in leases with the City that:
 - 1) Allow the City Manager to negotiate a parking lease that includes a duration of free parking for up to one-half the duration of the tenant's office lease, without the current 2-year limitation; and
 - 2) Allow the business applicant an option to terminate the parking lease at any point during its term, so long as the company continues to occupy its current office space within the city of San José.

BACKGROUND

As councilmember's, we routinely field the complaints of businesspeople frustrated in their efforts to navigate the bureaucracy of City Hall. All too often, our inquiry leads to a sense of resignation when a seemingly reasonable process does not result in a reasonable outcome. The challenges appear compounded by the painful loss of over 100 employees in the Department of Planning, Building, and Code Enforcement over the last 24 months, severely compromising our flexibility and responsiveness. The Director's recent efforts to restore lost capacity-- such as by adding express lines for the Special Tenant (STI) and Industrial Tools (ITI) programs—will help, but it will take time before the lengthy backlogs are expected to ease.

As we muddle through this anemic recovery, however, our economic competitiveness as a city becomes paramount. Although we lack the resources to attract employers with the kinds of monetary incentive programs that other cities offer, there appears much that we can do that costs little or nothing.

The most important changes we can make start with our relationships with existing businesses. Insofar as their opinions become the standard by which the reputation of San José's business climate is judged, we can improve our ability to attract their peers.

With the following measures, we propose to cure a small number of "glitches" in our processes that have created a set of headaches needing remedy. We submit several for Council's consideration, and we encourage our colleagues to creatively add ideas and "fixes" as this process moves forward.

The rationale for Recommendations 1 and 2 appears self-evident to many of us who have fielded calls from frustrated businesspeople. Some have become upset that they've "just received the bill"

containing a jaw-dropping list of city fees and charges. Others describe in painful detail how various inspectors Public Works, Fire, ESD, or PBCE gave conflicting direction that has left them wondering how to satisfy the many-headed beast of City Hall.

The remaining three recommendations merit more involved discussion:

Legal Nonconforming (LNC) Uses

The Municipal Code currently allows that a business operating under a legal nonconforming use “may be continued indefinitely,” but it must conform to the current zoning or obtain a special use permit “if such use is discontinued or abandoned for a period of six months or more.” S.J.M.C. §20.150.020. Although the current statutory language seems sensible enough—a nonconforming business can only continue operating if they’ve been doing so continuously—its implementation has caused fits for staff and businesses.

Employers that have recently attempted to avail themselves of a certificate of legal noncompliance have been met with evidentiary requirements that the owner “prove” continuous use, without any possible “break” of six months in that duration. As one restaurant owner put it, “that’s like telling me to prove that I’ve never served milk with an expired date.”

The owner of Taqueria Lorena’s, for instance, had kept her 24th Street business open until 2 a.m. since the 1980’s, when the zoning code allowed that use at the site. The code has changed since, and in 2009, a City inspector deemed Taqueria Lorena’s out of compliance by operating beyond midnight, because she did not possess a valid CUP. Months left the owner with the choice of either paying thousands of dollars to apply for a permit—with no assurance that she would receive one—or to satisfy a hefty evidentiary burden: documentary evidence that there was “continuous use” until 2 a.m. for several years.

Remarkably, the owner could produce a signed affidavit from a retired San Jose Police Officer, attesting to his regular late-night stops there. She could also point to the aged, peeling “hours of operations” sign of the door demonstrated ongoing use until 2 a.m.. Nonetheless, that wasn’t enough; she was told that the Code required documents such as years-old cash register receipts substantiating late-night operation. Moreover, there had to be enough of those receipts such that there would be no 6-month “gaps” in the evidence. After many dozens of wasted hours spent hunting for receipts and business records, and after the expenditure of thousands on consultant fees, the restaurant owner now awaits a ruling from Planning for an LNC letter.

The alternatives suggested in the “Recommendation” section, above, could have easily resolved this stalemate, and would do so for dozens of other similarly-situated business owners.

Hotels

Prior to our revision of the statutory scheme several months ago, the City required that alcohol-serving businesses obtain an “Entertainment Permit” under Title 6 if presenting live entertainment, amplified music, or dancing. However, the ordinance specifically exempted hotels and motels from the requirement. S.J.M.C. §6.60.050. The rationale for exempting hotels followed from the simple fact that their financial survival depends on guests having a good night’s sleep. Accordingly, they

have adequate motivation to “keep a lid” on weddings, dances, or other events, so as to avoid disruption to people sleeping in the same building. The City also required a Conditional Use Permit under Title 20 for such establishments.

Council has since consolidated the Title 6 and Title 20 requirements to streamline the permit procedures, now requiring only a CUP under Title 20 for such uses. We failed to transfer the hotel exemption, however, to the Title 20 requirements.

We now propose a simple exemption of mid-size and large (75-room or more) full-service hotels from the CUP requirement. In place of a CUP, we expect Planning should impose uniform restrictions via ordinance relating to hours of operation and noise that will enable Code Enforcement or the Police keep any operator within reasonable limits.

Parking Incentive

In March, we approved a new parking incentive program designed to allow downtown San José to compete with nearby municipalities to attract office and retail tenants. The incentive offers free parking (for new lessees) or a 50% discount (for renewals) to any small or medium-sized tenant who signs a lease for no more than 50 employees, for a duration equal to one half the term of the lease, but no longer than 2 years.

Waiving of fees for leases of parking in City garages emerged from the input of businesses and commercial brokers who complained that parking costs made Downtown office uncompetitive with similar space in Santa Clara, Mountain View, or Campbell, particularly in a time of thin corporate margins.

A problem remains for small start-up companies, however, many of which inhabit incubators, like the Irish Innovation Center, or private entities offering shared workspace, such as NextSpace. Their tenants have a high mortality rate, and the volatility of those companies makes the signing of a long-term lease unlikely.

It is no secret that San José has long struggled to attract start-up companies. Within the Bay Area, where San José is by far the largest city, we rank 11th among our peers in venture capital investment in start-ups, well behind such small suburbs as Menlo Park and San Carlos. *Mercury News* business columnist Chris O’Brien wrote about San José’s long-acknowledged “startup deficiency” in May, and urged the City to subsidize parking for startups “to compete with free or cheap parking in towns like Palo Alto.”

The solution we propose would give incubators and shared workspace offices an ability to “option out” of the parking lease at any time, so long as they keep a San José address. This additional flexibility helps brokers “close the deal” between downtown tech start-up centers and their tenants.

Other tenants who have signed longer term leases (i.e., 5 years or longer) have complained that they do not benefit from their greater commitment, because the ordinance drafted by staff contained a ceiling of 2 years for the free portion of any parking arrangement. We have sought to remedy each of these “hiccups” with the recommendation described in paragraph 5, above.

With these proposals, we believe San José will take strides in improving its reputation as a business-friendly destination—an important step in getting our residents back to work.